

IN THE MATTER OF the *Public Inquiries Act*, S.O., 2009

AND IN THE MATTER OF the *Municipal Act*, 2001, S.O. 2001

AND IN THE MATTER OF the *Town of Collingwood Judicial Inquiry*

## **MEMORANDUM OF ARGUMENT**

October 26, 2018

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## **MEMORANDUM OF ARGUMENT**

### **PART I - INTRODUCTION**

1. Mayor Sandra Cooper and Paul Bonwick (together, the “**Applicants**”) bring separate applications requesting further recommendations from Commissioner Associate Chief Justice Frank N. Marrocco (the “**Commissioner**”) regarding the allocation of funding that the Applicants have been granted for representation in this judicial inquiry.
2. In support of these requests, Mayor Cooper and Mr. Bonwick both seek to examine Mr. Fareed Amin, the Chief Administrative Officer of the Town of Collingwood (“**CAO Amin**”).
3. The Town of Collingwood (the “**Town**”) submits that CAO Amin cannot be compelled to testify before the Commission with respect to his decisions regarding funding allocations for inquiry participants because:
  - (a) The power to consider individual participants’ applications for funding and decide whether and to what extent funding should be extended to a participant was delegated to CAO Amin by municipal council;

- (b) Any evidence that CAO Amin might provide with respect to these participant funding decisions is irrelevant to this Inquiry's Terms of Reference, as the Commissioner is not sitting as a judge of the Divisional Court presiding over a judicial review;
  - (c) Further, these participant funding decisions are subject to the principle that the motives of a legislative body are "unknowable";
  - (d) Further, or in the alternative, such decisions are protected by the rule of deliberative secrecy.
4. For all of the foregoing reasons, CAO Amin should not be compelled to testify.
5. The Town also opposes Mayor Cooper's request for a delay in the commencement of the Inquiry hearings. However, the Town takes no position with respect to the Applicants' request for further funding recommendations from the Commissioner.

## **PART II - SUMMARY OF FACTS**

### **Background**

6. On February 26, 2018, the municipal council of the Town of Collingwood voted to request an independent judicial inquiry under section 274 of the *Municipal Act, 2001* to inquire into all aspects of the Town's sale of shares of Collingwood Utility Services Corporation to PowerStream Inc. and the allocation of the proceeds of that sale (the "**Collingwood Inquiry**" or the "**Inquiry**").

## The Funding of the Collingwood Inquiry

7. Pursuant to the *Municipal Act, 2001*, the Collingwood Inquiry’s Terms of Reference (“**TOR**”), and the Inquiry’s Rules, responsibility for funding the Collingwood Inquiry lies with the municipality.

8. Section 274 of the *Municipal Act, 2001* indicates the following with respect to funding for judicial inquiries:

### *Counsel*

(4) The **council** may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry. 2001, c. 25, s. 274 (4).

[...]

### *Costs*

(6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the **municipality**. 2001, c. 25, s. 274 (6).<sup>1</sup>

9. The TOR for the Collingwood Inquiry were crafted recognizing the municipality’s responsibility to provide the funding for the Inquiry.<sup>2</sup>

10. Rule 41 of the Collingwood Inquiry’s Rules of Procedure are consistent with section 274(4) of the *Municipal Act, 2001* and the TOR:

“Counsel will be retained at the expense of the witness and people with standing. The terms of reference do not grant the Judge jurisdiction to order the Town of Collingwood to provide funding for legal counsel. However, requests for funding may be made to the Judge at the hearing on

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<sup>1</sup> [emphasis added] *Municipal Act, 2001*, SO 2001, c 25, ss 274(4) and (6).

<sup>2</sup> See Terms of Reference attached as Appendix “A” to this Memorandum.

standing and the Judge may make recommendations to the Town of Collingwood.”<sup>3</sup>

11. Therefore, while the Commissioner may make recommendations with respect to funding, the ultimate decision regarding participants’ entitlement to funding rests with the Town.

### **The Process Leading to the Funding Decision**

12. On April 30, 2018, CAO Amin and Marjory Leonard, Treasurer for the Town, submitted a staff report to municipal council identifying the estimated costs and requirements of the judicial inquiry (the “**Staff Report**”).<sup>4</sup>

13. The Staff Report made a number of recommendations with respect to Inquiry funding. In particular, the Report noted that: <sup>5</sup>

- (a) “Council should authorize outside legal counsel to be retained to represent the municipality in the conduct of a judicial inquiry to ensure there is no perception of bias and to ensure the integrity of the process in the public eye.
- (b) Council must also give consideration to paying for the costs of legal counsel for the parties to the proceedings or for members of Council or staff called upon to provide testimony;
- (c) It is very difficult to estimate the potential costs of an inquiry due to the unknowns that will impact the hearing length, any potential delays in receiving documents and materials, unknown forensic audit and investigative needs, determination of the

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<sup>3</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding*, citing Rule 41 of the Inquiry’s Rules of Procedure at para 15.

<sup>4</sup> Part I Application Record, Tab C, Staff Report T2018-06, page 1 of 17.

<sup>5</sup> Part I Application Record, Tab C, Staff Report T2018-06, page 2-3 of 17.

parties and witnesses, the potential for legal challenges and many other issues that can arise.”<sup>6</sup> [emphasis added]

14. The Staff Report also included costing assumptions based on a nine month period for inquiry, but noted that the authors would have a better idea of the costs and timelines after the documentary phase was complete. The Report provided a preliminary estimate that \$240,000 would be provided toward Town Counsel and \$240,000 toward counsel for other parties, council members, and staff.<sup>7</sup>

15. On April 30, 2018, council passed a resolution that it receive the Staff Report identifying the costs and requirements of the judicial inquiry, and that it delegate the authority to the CAO Amin to “take and authorize any actions necessary or appropriate including actions as required by the Justice presiding over the Inquiry.”<sup>8</sup> Accordingly, in making his funding decisions, CAO Amin was standing in the shoes of council.

16. Pursuant to Rule 41 of the Collingwood Inquiry’s Rules of Procedure, participant requests for funding were heard by the Commissioner at the hearing on participation on August 14, 2018.

17. On August 20, 2018, the Commissioner delivered his Reasons and Decision Concerning Participation and Funding.<sup>9</sup> In these Reasons, the Commissioner referred to the April 30, 2018 Staff Report submitted to Town council, as well as a number of factors that guided his decisions about whether to recommend that a particular participant obtain funding from the Town.<sup>10</sup>

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<sup>6</sup> Part I Application Record, Tab C, Staff Report T2018-06, page 3 of 17.

<sup>7</sup> Part I Application Record, Tab C, Staff Report T2018-06, page 6 of 17.

<sup>8</sup> Schedule “B” to this Memorandum, Resolution of the Town of Collingwood dated April 30, 2018.

<sup>9</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding*.

<sup>10</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding* at paras 16-17.



18. With respect to Mr. Bonwick, the Commissioner recommended that he be granted funding; however, given that Mr. Bonwick had not provided details of the assets and liabilities of his company, the Commissioner recommended that the Town obtain this information before deciding whether to provide Mr. Bonwick with funding.<sup>11</sup> The Commissioner did not specify the amount of funding recommended or any other terms or conditions related to funding.<sup>12</sup>

19. With respect to Mayor Cooper, the Commissioner recommended that the Town favourably consider her request for funding. The Commissioner did not specify the amount of funding recommended or any other terms or conditions related to funding.<sup>13</sup>

20. Finally, the Commissioner made a number of general recommendations as to funding principles for the Town of Collingwood.<sup>14</sup> As a guiding principle, the Commissioner recommended that the Town seek to balance the need to provide funding for counsel to ensure the inquiry process was fair with the need to use public funds prudently.<sup>15</sup>

### **CAO Amin Makes the Funding Decisions**

21. On August 28, 2018, CAO Amin wrote an e-mail to counsel for Mayor Cooper indicating the amount and the terms of the funding support that would be provided by the Town to counsel for the Mayor.<sup>16</sup> While counsel for Mayor Cooper has disclosed some of his correspondence with CAO Amin, the Town has treated its funding correspondence as confidential.

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<sup>11</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding* at para 30.

<sup>12</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding* at para 41.

<sup>13</sup> *Ibid.*

<sup>14</sup> See Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding* at paras 55-56.

<sup>15</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding* at para 55.

<sup>16</sup> Part I Application Record, Tab A, page 16, E-mail from Fareed Amin to George Marron, dated August 28, 2018.

22. On October 10, 2018, following extensive correspondence and discussions between CAO Amin and counsel for Mr. Bonwick, the Town communicated its funding decision.

23. In reaching his funding decisions, CAO Amin was required to take into account:

- (a) The recommendations made in the Commissioner's Reasons;
- (b) In particular, the Commissioner's recommendation that funding decisions strike an appropriate balance between ensuring a fair process and the prudent use of public funds;
- (c) The budgetary constraints of the Town of Collingwood outlined in the Staff Report;
- (d) Financial information provided in confidence;
- (e) Any further information provided by counsel for the participant.

24. The Applicants now seek to examine CAO Amin with respect to these funding decisions.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **A. ISSUES**

25. The main issue addressed in this factum is whether CAO Amin can be compelled to give evidence on his decisions regarding the Applicants' entitlements to funding.

26. The Town submits that CAO Amin cannot be examined on this motion for the following reasons:

- (a) The motives of municipal council are "unknowable" and cannot be determined by an examination under oath. Council speaks through its formal decisions;

- (b) Therefore, any testimony given by CAO Amin with respect to his participant funding decisions made on behalf of municipal council would be irrelevant to the terms of this Inquiry;
- (c) Further, or in the alternative, CAO Amin's decisions with respect to funding are protected by the principle of deliberative secrecy.

## **B. THE NATURE OF CAO AMIN'S DECISION**

27. The Applicants seek to examine CAO Amin regarding his decisions on the Applicants' entitlement to funding for counsel. As an exercise of delegated authority from municipal council, CAO Amin's decisions had a public character and embodied elements of municipal council's legislative, regulatory, and adjudicative authority.<sup>17</sup> The funding decisions involved balancing multiple policy-laden considerations with funding principles and guidelines. Because he was acting in this capacity on behalf of municipal council, CAO Amin cannot be examined with respect to these decisions or his decision-making process.

28. CAO Amin's decisions constituted exercises of a statutory power of decision delegated to him by municipal council. Section 1 of the *JRPA* defines a "statutory power of decision" as follows:

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

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<sup>17</sup> *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 2.

and includes the powers of an inferior court.<sup>18</sup> [emphasis added]

29. The decision to allocate funding to Inquiry participants falls within the definition of a “statutory power of decision,” as one which decides “the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not.”<sup>19</sup>

30. As outlined above, decisions regarding the allocation of inquiry funding are within the sole discretion of municipal council. Section 274 of the *Municipal Act, 2001* indicates that the responsibility for funding the Inquiry lies with the Town, and nothing in the TOR displaces the municipality’s authority or responsibility.<sup>20</sup> While the Inquiry Commissioner may make recommendations with respect to funding, the ultimate adjudication of funding entitlement rests with municipal council.<sup>21</sup>

31. Municipal council, by way of resolution, delegated its authority to make funding entitlement decisions to CAO Amin.<sup>22</sup>

32. Standing in council’s shoes, CAO Amin received financial information from potential Inquiry participants. He considered the principles outlined by the Commissioner in the Reasons, as well as his overall duty to act in the public interest by balancing fairness to the participants with the overall public need to use public funds prudently. Taking these factors into consideration, he reached a decision with respect to each participant’s entitlement to funding and the parameters

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<sup>18</sup> *Judicial Review Procedures Act*, RSO 1990, c J1, s 1.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Municipal Act, 2001*, SO 2001, c 25, ss 274(4) and (6); Terms of Reference attached as Appendix “A” to this Memorandum.

<sup>21</sup> Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding*, citing Rule 41 of the Inquiry’s Rules of Procedure at para 15.

<sup>22</sup> Schedule “B” to this Memorandum, Resolution of the Town of Collingwood dated April 30, 2018.

surrounding said entitlements. He then issued reasons, by way of an email to each participant's counsel, for his decisions.

33. The purpose of public law immunities is to protect decisions of an adjudicative, legislative, regulatory, policy or purely discretionary nature made by public bodies.<sup>23</sup> As a result, limits may be placed on the right to examine members of decision-making authorities on the considerations on which their decisions are based.<sup>24</sup> CAO Amin's participant funding decisions are precisely the type of administrative decision to which traditional public law immunities apply.

**C. CAO AMIN'S DECISIONS ARE NOT RELEVANT TO THIS INQUIRY BECAUSE THE MOTIVES OF THE LEGISLATOR ARE "UNKNOWABLE"**

34. CAO Amin cannot be examined with respect to his funding decision because the motives of municipal council are not knowable except through its formal decisions.<sup>25</sup> This rule, which the Supreme Court of Canada has characterized as a rule of relevance, applies to decisions of a legislative, regulatory, policy or purely discretionary nature made by public bodies.<sup>26</sup>

**(i) *The Clearwater rule***

35. The rule that the motives of legislative bodies are unknowable except through their decisions was first iterated by the Supreme Court of Canada in *Consortium Developments (Clearwater) Ltd v Sarnia (City)* ("*Clearwater*").<sup>27</sup> In *Clearwater*, a land developer sought to summons in court certain members of a municipal council who voted for a judicial inquiry into transactions involving the developer. Justice Binnie, writing for the Court, held that the summons should be quashed and noted the following:

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<sup>23</sup> *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 2.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3.

<sup>26</sup> *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 47.

<sup>27</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 45.

The motives of a legislative body composed of numerous persons are “unknowable” except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party’s effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications.<sup>28</sup>

36. Based on this passage from Justice Binnie, in *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval* (“Laval”), the Supreme Court of Canada noted that the rule in *Clearwater* may be appropriately characterized as a rule of relevance. In other words, the motives of individual lawmakers are not relevant to the question of legislative intent or the validity of legislative decisions.<sup>29</sup>

37. This rule is ultimately grounded in respect for the separation of powers. In *Clearwater*, the Court noted that it had “neither the duty nor our right to investigate the motives” behind a decision of the Governor in Council.<sup>30</sup>

**(ii) *The Clearwater rule applies to CAO Amin’s funding decisions***

38. Like in *Clearwater*, the Commissioner here possesses neither the duty nor the authority to investigate the motives behind CAO Amin’s participant funding decisions.<sup>31</sup>

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<sup>28</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 45.

<sup>29</sup> *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8 at paras 36, 45 and 47.

<sup>30</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 44, citing *Thorne’s Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 112 or paras 13-14.

<sup>31</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 44, citing *Thorne’s Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 112 or paras 13-14.

39. These decisions were made in an exercise of municipal council's statutory authority based on multifaceted policy considerations, including resource and budgetary concerns.<sup>32</sup> The decision-making process involved balancing the interests of individual participants both as against one another and as against the broader public interest. CAO Amin's funding decisions therefore fall within the protection afforded by the *Clearwater* rule as they are decisions of a legislative, regulatory, policy or purely discretionary nature made by a public body.

**(iii) *CAO Amin's testimony is not relevant to this Inquiry; his decision speaks for itself***

40. A party seeking to conduct the examination must show on a reasonable evidentiary basis that the examination would be conducted on an issue relevant to the application and that the proposed witness is in a position to offer relevant evidence.<sup>33</sup>

41. Just as evidence about the motives of individual members of municipal council are irrelevant to the validity of the decision of the council, so too is Mr. Amin's evidence irrelevant to the validity of the participant funding decisions in this case.<sup>34</sup>

42. Furthermore, the Commissioner is not empowered with the authority of the Divisional Court to review administrative decisions such as CAO Amin's for validity. The Commissioner's authority with respect to this Inquiry stems from the Inquiry's TOR. In this case, the TOR relate to questions surrounding the Town's sale of shares of Collingwood Utility Services Corporation to

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<sup>32</sup> See e.g. Part I Application Record, Tab C, Staff Report T2018-06 for some of the policy considerations that Mr. Amin was required to take into consideration in making his funding decisions; *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2016 BCSC 2375 at paras 39 and 44.

<sup>33</sup> *Summitt Energy Management Inc v Ontario (Energy Board)*, 2012 ONSC 2753 at para 48; *Airport Taxicab (Pearson Airport) Assn v Toronto (City)*, 2009 CarswellOnt 2905 at para 26, 177 ACWS (3d) 813.

<sup>34</sup> *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 45.

PowerStream Inc. and the allocation of the proceeds of that sale. Any evidence CAO Amin may give with respect to his participant funding decisions is irrelevant to those terms.

43. Though CAO Amin acted as sole decision-maker in this case, his decisions constituted the official expression of municipal council's will. The *Clearwater* rule holds that statements made by individual members of council cannot be taken as determinative of the intent of council as a whole when enacting a particular resolution or by-law.<sup>35</sup> Similarly, any statements made by CAO Amin with respect to the considerations on which his decision was based could not be taken as determinative of municipal council's intent.

44. Instead, CAO Amin's reasons on their face represent the exercise of municipal council's authority within its jurisdiction. His reasons disclose all that is necessary to evidence municipal council's intent. It is not appropriate to look beyond those reasons to the motives of the particular decision-maker.<sup>36</sup>

45. Absent any allegations of impropriety or bad faith, CAO Amin's motives for allocating funding in the manner chosen are not relevant to his exercise of statutory authority in the shoes of municipal council.<sup>37</sup> He therefore cannot be compelled to testify with respect to these motives.

#### **D. DELIBERATIVE SECRECY APPLIES TO CAO AMIN'S FUNDING DECISIONS**

46. In the alternative, if CAO Amin's decisions do not fall within the scope of the *Clearwater* rule – for example, because they are not found to be “decisions of a legislative, regulatory, policy or purely discretionary nature” – then they must fall within the scope of the principle of

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<sup>35</sup> 2386240 *Ontario Inc v The City of Mississauga*, 2018 ONSC 3162 at para 51.

<sup>36</sup> 2386240 *Ontario Inc v The City of Mississauga*, 2018 ONSC 3162 at para 51; *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2016 BCSC 2375.

<sup>37</sup> *Airport Taxicab (Pearson Airport) Assn v Toronto (City)*, 2009 CarswellOnt 2905 at paras 52-55, 177 ACWS (3d) 813; *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2016 BCSC 2375 at para 47.



deliberative secrecy (also known as deliberative privilege) as administrative decisions of an adjudicative or quasi-adjudicative nature.

47. Pursuant to section 33(13) of the *Public Inquiries Act, 2009*, “[n]othing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.”<sup>38</sup>

**(i) *The principle of deliberative secrecy***

48. The principle of deliberative secrecy prevents the disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions, and to prevent decision-makers from having to spend more time testifying about their decisions than making them.<sup>39</sup> The principle of deliberative secrecy is essential in order for administrative decision-makers to perform their adjudicative functions.<sup>40</sup>

**(ii) *The principle of deliberative secrecy applies to CAO Amin’s funding decisions***

49. The principle of deliberative secrecy applies whenever evidence is sought about how or why an administrative tribunal reached a decision.<sup>41</sup> This protection extends to the “administrative aspects of the decision-making process.”<sup>42</sup>

50. Decisions of a municipal council can attract the protection of deliberative secrecy where members of municipal council act in a judicial or quasi-judicial capacity.<sup>43</sup> In *Hamilton (City) v*

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<sup>38</sup> SO 2009, c 33, Sched 6.

<sup>39</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 14.

<sup>40</sup> *Taylor v Ontario (Workplace Safety & Insurance Board)*, 2017 ONSC 1223 at para 58.

<sup>41</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 13.

<sup>42</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 15.

<sup>43</sup> See e.g. *Hamilton (City) v Ombudsman*, 2017 ONSC 4865; *Broda v Edmonton (City)*, 102 AR 255, 17 ACWS (3d) 972.

*Ombudsman*, the Ontario Divisional Court held that the deliberations of a municipal Election Compliance Audit Committee and the Property Standards Committee were protected by the principle of deliberative secrecy.<sup>44</sup>

51. In *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, Justice Cromwell for the Nova Scotia Court of Appeal, as he then was, held that deliberative secrecy extends to the administrative aspects of the decision-making process, including the assignment of adjudicators to particular cases.<sup>45</sup> The protection of deliberative secrecy can also extend to the staff of decision-makers.<sup>46</sup>

52. In the Supreme Court of Canada’s decision, *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval*, the Court confirmed that the principle of deliberative secrecy applies to administrative decision-makers whose decisions are sufficiently public and judicial or quasi-judicial in nature.<sup>47</sup> In that case, the Court held that the decision at issue – the decision of a Board to dismiss an employee – was one of a private nature that fell within the realm of employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply.

53. In contrast, the allocation of Inquiry funding is a public decision exercised pursuant to section 274 of the *Municipal Act, 2001*, the Inquiry’s TOR, and the Rules.<sup>48</sup> The authority to render this decision was delegated to CAO Amin by way of a municipal council resolution. In

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<sup>44</sup> 2017 ONSC 4865.

<sup>45</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA at paras 15-17.

<sup>46</sup> See e.g. *Broda v Edmonton (City)*, 102 AR 255, 17 ACWS (3d) 972.

<sup>47</sup> 2016 SCC 8 at paras 58-60, [2016] 1 SCR 29.

<sup>48</sup> *Municipal Act, 2001*, SO 2001, c 25, ss 274(4) and (6); Terms of Reference attached as Appendix “A” to this Memorandum; Part I Application Record, Tab B, *Reasons and Decision Concerning Participation and Funding*, citing Rule 41 of the Inquiry’s Rules of Procedure at para 15.

making the final funding allocations, CAO Amin received submissions from affected participants, considered applicable principles and guidelines, allocated the funding, and issued reasons (his confidential emails) for these allocations. His decisions, made in the context of a judicial inquiry, were therefore both public and quasi-adjudicative in nature.

54. Deliberative secrecy is intended to protect the confidentiality of the information regardless of the forum in which the information is sought.<sup>49</sup> Therefore the protection of deliberative secrecy applies to the judicial inquiry context in the same manner as the judicial review or civil litigation contexts.<sup>50</sup>

55. Finally, the Applicants do not specify exactly what information they seek to elicit from CAO Amin. However, the jurisprudence is clear that deliberative secrecy applies “broadly to both matters of substance (that is, how decision-makers think about the case) and to the process by which adjudicators make their decisions.”<sup>51</sup> Therefore, beyond biographical details about Mr. Amin himself, any information that would be relevant to the issue of funding would likely be precluded from examination.<sup>52</sup>

***(iii) There are no valid reasons for lifting the protection of deliberative secrecy***

56. Although the principle of deliberative secrecy does not apply as strongly to administrative tribunals as to courts, the Supreme Court of Canada has confirmed that deliberative secrecy is the general rule for administrative tribunals.<sup>53</sup> The protection afforded by this rule will only be lifted

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<sup>49</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 21.

<sup>50</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 21.

<sup>51</sup> *Taylor v Ontario (Workplace Safety & Insurance Board)*, 2017 ONSC 1223 at para 59.

<sup>52</sup> See e.g. *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at paras 24-31.

<sup>53</sup> *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 58, [2016] 1 SCR 29.

“when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.”<sup>54</sup>

57. Given the importance of deliberative secrecy to adjudicative decision-making, the party arguing to lift deliberative secrecy bears the onus of demonstrating that the process did not comply with the rules of natural justice or procedural fairness, and the party must establish “valid reasons” for believing that lifting deliberative secrecy will show that the decision-maker made a reviewable error.<sup>55</sup> These efforts must be undertaken, if at all, in a judicial review.

58. In this case, there is no valid reason to lift the protection of deliberative secrecy. The Applicants cannot show “clearly articulated and objectively sound reasons for believing that the process did not comply with the rules of natural justice or procedural fairness.”<sup>56</sup>

## **E. CONCLUSION**

59. Mr. Amin, in his capacity as CAO, exercised a statutory power of decision that required him to receive submissions from participants, apply the principles recommended in the Commissioner’s Reasons, and balance the needs of individual participants with the overall public interest in keeping the costs of the Inquiry reasonable. Public administrative decisions such as these are not the appropriate subject of examination. Mr. Amin therefore cannot be compelled to testify on these motions.

## **PART IV - ORDER REQUESTED**

60. The Town of Collingwood requests:

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<sup>54</sup> *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8 at para 58, [2016] 1 SCR 29.

<sup>55</sup> *Taylor v Ontario (Workplace Safety & Insurance Board)*, 2017 ONSC 1223 at para 62; *Summitt Energy Management Inc v Ontario (Energy Board)*, 2012 ONSC 2753 at para 82.

<sup>56</sup> *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 36.

- (a) A ruling that CAO Amin cannot be examined for the purposes of the motions brought by Mayor Cooper and Mr. Bonwick.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of October, 2018.

---

William C. McDowell

**LENCZNER SLAGHT ROYCE  
SMITH GRIFFIN LLP**

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## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8
2. *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3
3. *Thorne’s Hardware Ltd v The Queen*, [1983] 1 SCR 106
4. *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2016 BCSC 2375
5. *Summitt Energy Management Inc v Ontario (Energy Board)*, 2012 ONSC 2753
6. *Airport Taxicab (Pearson Airport) Assn v Toronto (City)*, 2009 CarswellOnt 2905, 177 ACWS (3d) 813
7. *2386240 Ontario Inc v The City of Mississauga*, 2018 ONSC 3162
8. *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37
9. *Taylor v Ontario (Workplace Safety & Insurance Board)*, 2017 ONSC 1223
10. *Hamilton (City) v Ombudsman*, 2017 ONSC 4865
11. *Broda v Edmonton (City)*, 102 AR 255, 17 ACWS (3d) 972

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

1. *Municipal Act, 2001*, SO 2001, c 25, ss 274
2. *Judicial Review Procedure Act*, RSO 1990, c J1, s 1
3. *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6, s 33
4. Resolution of the Town of Collingwood dated April 30, 2018

## **Municipal Act, 2001**

### **S.O. 2001, CHAPTER 25**

#### **Investigation by judge**

274 (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;

(b) inquire into any matter connected with the good government of the municipality; or

(c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors. 2001, c. 25, s. 274 (1).

#### **Application of Public Inquiries Act, 2009**

(2) Section 33 of the Public Inquiries Act, 2009 applies to the investigation or inquiry by the judge. 2009, c. 33, Sched. 6, s. 72 (5).

#### **Report**

(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable. 2001, c. 25, s. 274 (3).

#### **Counsel**

(4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry. 2001, c. 25, s. 274 (4).

#### **Representation by counsel**

(5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel. 2001, c. 25, s. 274 (5).

#### **Costs**

(6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality. 2001, c. 25, s. 274 (6).



## **Judicial Review Procedure Act**

### **R.S.O. 1990, CHAPTER J.1**

#### **Definitions**

1 In this Act,

“application for judicial review” means an application under subsection 2 (1); (“requête en révision judiciaire”)

“court” means the Superior Court of Justice; (“Cour”)

“licence” includes any permit, certificate, approval, registration or similar form of permission required by law; (“autorisation”)

“municipality” has the same meaning as in the Municipal Affairs Act; (“municipalité”)

“party” includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); (“partie”)

“statutory power” means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; (“compétence légale”)

“statutory power of decision” means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. (“compétence légale de décision”) R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

**Public Inquiries Act, 2009**

**S.O. 2009, CHAPTER 33**

**SCHEDULE 6**

**Definition**

33 (1) In this section,

“inquiry” includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable. 2009, c. 33, Sched. 6, s. 33 (1).

**Standard procedure**

(2) This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section. 2009, c. 33, Sched. 6, s. 33 (2).

**Power to summon witnesses, papers, etc.**

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

**Form and service of summons**

(4) A summons issued under subsection (3) shall be in either the English or French version of the form prescribed by the regulations and shall be served personally on the person summoned and he or she shall be paid at the time of service the like fees and allowances for attendance as a witness before the person or body conducting the inquiry as are paid for the attendance of a witness summoned to attend before the Superior Court of Justice. 2009, c. 33, Sched. 6, s. 33 (4).

**Stated case for contempt for failure to attend hearing, etc.**

(5) Where any person without lawful excuse,

(a) on being duly summoned under subsection (3) as a witness at an inquiry makes default in attending at the inquiry; or

(b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the person or body conducting the inquiry to be taken or made, or to produce any document or thing in his or

her power or control legally required by the person or body conducting the inquiry to be produced, or to answer any question to which the person or body conducting the inquiry may legally require an answer; or

(c) does any other thing that, if the person or body conducting the inquiry had been a court of law having power to commit for contempt, would have been contempt of that court,

the person or body conducting the inquiry may state a case to the Divisional Court setting out the facts and that court may, on the application of the person or body conducting the inquiry or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. 2009, c. 33, Sched. 6, s. 33 (5).

### **Protection of witnesses**

(6) A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. 2009, c. 33, Sched. 6, s. 33 (6).

### **Right to object**

(7) A witness shall be informed by the person or body conducting the inquiry of his or her right to object to answer any question under section 5 of the Canada Evidence Act. 2009, c. 33, Sched. 6, s. 33 (7).

### **No discipline of employees**

(8) No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry. 2009, c. 33, Sched. 6, s. 33 (8).

### **Offence**

(9) Any person who, contrary to subsection (8), takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. 2009, c. 33, Sched. 6, s. 33 (9).

### **Application**

(10) This section applies despite any other Act and the oath of office of a public servant within the meaning of the Public Service of Ontario Act, 2006 is not breached where information is disclosed as described in subsection (8). 2009, c. 33, Sched. 6, s. 33 (10).

### **Effective date**

(11) This section applies to representations made, and information disclosed, on or after June 12, 2000. 2009, c. 33, Sched. 6, s. 33 (1).

### **Unsworn evidence admissible**

(12) A person or body conducting the inquiry may admit at an inquiry evidence not given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (12).

### **Privilege**

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

### **Release of documents**

(14) Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time. 2009, c. 33, Sched. 6, s. 33 (14).

### **Photocopies of documents**

(15) Where a document has been produced in evidence before a person or body conducting the inquiry, the person or body conducting the inquiry may or the person producing it may with the leave of the person or body conducting the inquiry, cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a copy of a document produced in evidence, certified to be a true copy thereof by the person or body conducting the inquiry, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced. 2009, c. 33, Sched. 6, s. 33 (15).

### **Power to administer oaths and require evidence under oath**

(16) A person or body conducting an inquiry has power to administer oaths and affirmations for the purpose of the inquiry and may require evidence to be given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (16).

### **Powers of multiple appointees**

(17) Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by subsection (3), (4), (14), (15) or (16). 2009, c. 33, Sched. 6, s. 33 (17).

**TOWN OF COLLINGWOOD**

April 30, 2018

RES- 136 -2018

MOVED BY.....Deborah Doherty.....

SECONDED BY.....Jeffery.....

**BE IT RESOLVED:**

**THAT Council receive Staff Report T2018-06**, identifying the costs and requirements of the judicial inquiry and delegate authority to the CAO to take and authorize any actions deemed necessary or appropriate including actions as required by the Justice presiding over the Inquiry; and further that a record of all actions shall be maintained.

- ☒ **CARRIED**  
☐ **DEFEATED**  
☐ **TABLED**

Moved by: \_\_\_\_\_

Seconded by: \_\_\_\_\_

Deferred Until: \_\_\_\_\_

Jandra Cooper  
**MAYOR**

[Signature]  
**CLERK**

<input checked="" type="checkbox"/> <b>RECORDED VOTE</b>		
<u>COUNCIL</u>	<u>Yea</u>	<u>Nay</u>
Cooper	X	
Saunderson	Absent	
Fryer		X
Edwards	X	
Ecclestone	X	
Jeffery	X	
Doherty	X	
Madigan	X	
Lloyd		X
TOTAL	6	2



**STAFF REPORT #T2018-06**  
**4/30/2018**

Amendments: None

**Submitted to:** Council  
**Submitted by:** Fareed Amin, CAO  
Marjory Leonard, Treasurer  
**Subject:** Judicial Inquiry

**PURPOSE**

This report provides potential cost estimates for the Judicial Inquiry and requests approval for the CAO to take the necessary actions and expend the necessary funds to meet the requirements of the Justice presiding over the Inquiry.

**RECOMMENDATION**

**THAT** Council receive Staff Report T2018-06 identifying the costs and requirements of the judicial inquiry and delegate authority to the CAO to take and authorize any actions deemed necessary or appropriate including actions as required by the Justice presiding over the Inquiry; and further that a record of all actions shall be maintained.

**AMENDMENTS**

None

**1. BACKGROUND**

At the February 26<sup>th</sup>, 2018 regular meeting of Council, resolution 042-2018 calling for a Judicial Inquiry into the 2012 Collus share sale to PowerStream was passed. Staff were directed to forward the resolution to the Chief Justice of the Superior Court of Justice. During the Inquiry, the Inquiry Judge will be referred to as the "Commissioner".

On April 6, 2018 Chief Justice Smith appointed the Honourable Mr. Justice Frank Marrocco, Associate Chief Justice of the Superior Court of Justice to serve as Commissioner to this Inquiry.

### **Purpose of a Municipal Public Inquiry**

The Mississauga Corporate Report regarding their Judicial Inquiry provides the following information related to the purpose of a Municipal Public Inquiry:

“Justice Binnie, in the Supreme Court of Canada Decision *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* defined the purpose of a municipal judicial inquiry as follows:

“the power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or “any part of its public business”, and any alleged misconduct in connection therewith, reaches back to Confederation. Apart from a few amendments to harmonize this power with other legislative changes in the Province, [Section 274 of the Municipal Act, 2001] is substantially unchanged from its predecessor section in 1866. This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its baileywick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected.”<sup>1</sup>

Further in her report, Ms. Bench, City Solicitor for Mississauga provided the Council with several points that should be understood. In regard to the Collingwood Inquiry, these points are also relevant. Highlighting of information related to aspects of potential costs have been made by staff and do not form part of the original document.

- “By its requesting resolution, Council has the ability to control the scope of the inquiry. The resolution must be carefully constituted as it will establish the terms of reference and mandate of the Commissioner. If the resolution is too vague, it may be struck out by the Courts for lack of sufficient particularity.
- Potential parties will be notified based on the terms of reference.
- A public inquiry is a public investigation, carried out in the public eye and is not a trial. A public inquiry seeks to explain why something occurred and not to determine guilt or liability. Unlike a court, it is not an adversarial proceeding.

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<sup>1</sup> Mississauga Corporate Report, October 13, 2009, Judicial Inquiry, Mary Ellen Bench, City Solicitor, p. 3.

- The findings of a judicial inquiry are not binding in subsequent court proceedings and there are no legal consequences attached to them.
- At the end of an inquiry, the Commissioner will report his/her factual findings, make observations and issue recommendations that may include legislative, policy or procedural changes to be implemented to address the specific concerns identified through the inquiry.
- The conduct and the rules of procedure to be followed on an inquiry is under the control and direction of the Commissioner.
- The Commissioner will determine which issues are to be reviewed and investigated within the parameters set by the terms of reference. Ancillary issues may come up during the inquiry not originally anticipated. The Commissioner's decisions in this respect will impact on the cost and length of the inquiry.
- The costs of the Commissioner will be paid by the Federal Government as a Justice of the Superior Court, however the Commissioner will likely engage legal counsel and possibly other persons to assist in the investigation or inquiry, and these costs plus any incidental expenses will be paid by the municipality.
- Council should authorize outside legal counsel to be retained to represent the municipality in the conduct of a judicial inquiry to ensure there is no perception of bias and to assure the integrity of the process in the public eye.
- Council must also give consideration to paying for the costs of legal counsel for the parties to the proceedings or for members of Council or staff called upon to provide testimony.
- It is very difficult to estimate the potential costs of an inquiry due to the unknowns that will impact the hearing length, any potential delays in receiving documents and materials, unknown forensic audit and investigative needs, determination of the parties and witnesses, the potential for legal challenges and many other issues that can arise.
- A time limit cannot be established by the municipality for an inquiry. The Act requires the Commissioner to report the results of the inquiry to Council "as soon as practicable".
- Any person who has substantial or direct interest in the subject matter of an inquiry is entitled to apply for standing. Where the Commissioner grants full standing, that person can call evidence and cross-examine witnesses, and also must agree to abide by the Rules of Procedure established by the Commissioner. Standing may be granted for the entire proceeding or only for part of it, and it may have lesser rights attached to it, as determined by the Commissioner.
- Legal counsel acting for parties at a judicial inquiry play a different role than in a courtroom and will be expected to assist the inquiry and ensure that all relevant and helpful evidence is brought forward."<sup>2</sup>

## 2. INPUT FROM OTHER SOURCES

<sup>2</sup> Ibid, pgs. 4 - 5



The *Mississauga Corporate Report, October 13, 2009, Judicial Inquiry*, prepared by the Mississauga City Solicitor, Mary Ellen Bench provided significant background information into the purpose and potential costs of a judicial inquiry.

### 3. APPLICABLE POLICY OR LEGISLATION

*Municipal Act, 2001, Section 274*  
*Public Inquiries Act, 2009, Section 33*

### 4. ANALYSIS

#### Terms of Reference (Appendix A)

The terms of reference for the Inquiry are a key element since they define what is to be inquired into and the scope of the Municipality's interest. The CAO has prepared the terms of reference and discussed them with the Commissioner and Commission Counsel.

#### Costing Estimates

As Ms. Bench has stated, the costs of a judicial inquiry are difficult to estimate and rely on the duration of the Inquiry. We have been provided with a list of potential cost types we may incur during the process. CAO Amin has had several meetings with Court staff and Justice Marrocco to discuss the requirements of the Justice.

Our costing assumptions are based on a nine (9) month inquiry however, after the documentary phase is complete we will have a better idea of the costs and timelines.

#### 1. Commission Counsel

The role of Commission Counsel is to investigate and lead evidence in a thorough, impartial and balanced manner. From previous inquiries, the presiding Justices have stated that the duty of the Commission Counsel is to ensure that all issues related to the public interest are brought to the Commissioner's attention. Justice Marrocco has chosen his Commission Counsel.

Billing rates and the length of the Inquiry will determine the actual expenditures. There will be two components to the estimate – time for investigative work and time for the hearing phase. Overall, staff are basing the cost estimate on the results of the Mississauga Inquiry.

Estimated investigative work – 320hrs x \$500/hr	<b>\$160,000.</b>
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Estimated hearing work – 320hrs x \$500/hr	<b>\$160,000.</b>
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#### 2. Investigative Staff/Policy Staff

The Commissioner and the Commission Counsel require a Junior Counsel and a law clerk to assist with summarizing evidence for the Commissioner, pre-interviewing witnesses, summarizing witness statements etc. Staff estimate the cost of a Junior Counsel as

Estimated investigative work – 320hrs x \$200/hr **\$64,000.**

Estimated hearing work – 320hrs x \$200/hr **\$64,000.**

Estimated cost for a law clerk based on a nine (9) month contract would be  
1,560 hrs x \$85/hr **\$132,600.**

### 3. Administration Staff

The Commissioner will require administrative support during the Inquiry. Staff estimate that this position would be required for approximately nine (9) months and would cost **\$75,000.**

### 4. Additional Staffing Requirements

a) Communications staff will be sourced from an outside firm on an as needed basis. The estimated cost for this service is **\$70,000.**

b) IT staff and assistance will be provided by the Town's IT department. This assistance is estimated to cost **\$25,000.**

c) Court reporter/transcriptionist to record inquiry proceedings. Staff are estimating the cost of these services on 320 hours hearing time. Rates for this service are estimated at \$85/hr for an estimated cost of: **\$27,200.**

There is also a per page charge in the range of \$6 per page for transcription services. Assuming the hearings generate 500 pages the cost would be **\$3,000.**

d) Commissioner incidental expenses estimated at **\$25,000.**

### 5. Physical Resource Requirements

#### a) Office Space

Staff have sourced suitable office space in the downtown core. The minimum term on the lease is one year at \$22.50 gross lease rate per sq. ft. The rate includes taxes, insurance and maintenance. Utility costs will be in addition to the lease rate. Minimal redecoration is required. Estimated one year commitment for the space **\$32,000.**

#### b) Office Furniture

Staff estimate the cost to furnish the space at **\$30,000.**

#### c) Computer Equipment

This item includes laptops, printers, servers, cabling, routers, wireless hubs, telephones, conference phone, boardroom TV/HD screen, and other peripherals

including software, document management software and virus protection. The estimated cost is **\$60,000.**

- d) Office Supplies  
Staff estimate the cost of office supplies for five (5) workstations at **\$5,000.**
- e) Venue(s) for Hearings  
Through discussions with Justice Marrocco, the CAO feels that the Council Chambers will be satisfactory for the public hearing phase.
- f) Security Staff  
Security staff may be required to escort witnesses to and from the hearings and provide security at the hearings themselves. Staff estimate this services could be provided by paid duty police officers. The cost estimate is based on  
Estimated hearing work – 320hrs x \$71/hr **\$22,720.**

#### **6. Other Costs**

- a) Counsel Representing the Town  
The role of the Municipality in the Inquiry is to:
- ensure that all information in Town files is made available to the Commissioner;
  - ensure that the Commissioner is aware of internal administrative procedures that may be relevant to the Inquiry; and,
  - respond to any requests from the Commissioner or the Commission Counsel for assistance.

In previous inquiries the cities all had internal legal departments and staff recommended that outside legal counsel be retained to represent their interests at the public inquiry.

The Town has association with several legal firms that can fulfill this need. The estimate, based on the Mississauga report is 75% of Commission Counsel **\$240,000.**

- b) Counsel for Parties, Council Members and Staff  
Legal counsel retained to represent the Town cannot represent the interests of individual employees or Members of Council. The Commissioner cannot order the Town to provide funding however, in order to ensure that all parties, staff and Council Members are treated in a fair and unbiased manner, the Town should consider funding these costs. Staff can only guess at the potential costs and are assuming these costs would be similar to the costs for Town counsel **\$240,000.**

### **5. EFFECT ON TOWN FINANCES**

This report has been prepared to provide Council and the residents of Collingwood with a background of the purpose of a judicial inquiry and the types of costs and associated estimates that may be encountered.

The total cost of the Judicial Inquiry, based on the information and requirements of the Commissioner, at this time, is estimated at \$1.4-1.6 million. There are sufficient funds in the Working Capital Reserve Fund to cover the items noted in the staff report.

## 6. APPENDICES & OTHER RESOURCES

<i>Appendix A</i>	<i>Terms of Reference</i>
<i>Appendix B</i>	<i>Section 274 of the Municipal Act, 2001</i>
<i>Appendix C</i>	<i>Section 33 of the Public Inquiries Act, 2009</i>

## SIGNATURES

Prepared by:  
*Marjory Leonard, Treasurer*  
Town of Collingwood

Department Head  
*Fareed Amin, CAO*  
Town of Collingwood

APPENDIX A  
Commission of Inquiry

Town of Collingwood

Draft Terms of Reference

WHEREAS on February 26, 2018, the Council of the Town of Collingwood passed Resolution 042-18 (the "Resolution") asking the Honourable Heather Smith, Chief Justice of the Superior Court of Justice, to designate a judge of the Superior Court of Justice to conduct an Inquiry in relation to the Town of Collingwood concluding a Share Purchase Agreement for the sale of Collingwood Utility Services Corporation to PowerStream Inc. on March 6, 2012 (the "Transaction"). The Resolution requesting the Inquiry was made pursuant to s. 274 of the *Municipal Act, 2001* and is attached as **Annex 1**.

AND WHEREAS on April 6, 2018, Chief Justice Smith designated the Honourable Frank Marrocco, Associate Chief Justice of the Superior Court of Justice, to serve as Commissioner to this Inquiry.

NOW THEREFORE, the Council of the Town of Collingwood does hereby resolve that:

the Terms of Reference of the Inquiry shall be to inquire into all aspects of the Transaction, including the history, the price at which the shares were sold and the impact on the Ratepayers of the Town of Collingwood, as it relates to the good government of the Municipality, or the conduct of its public business, and to make any recommendations that the Commissioner may deem appropriate and in the public interest as a result of the Inquiry.

AND IT IS FURTHER RESOLVED that pursuant to s. 274 of the *Municipal Act, 2001*, and s. 33 of the *Public Inquiries Act*, the Commissioner, in conducting the Inquiry into the Transaction to which the Town of Collingwood is a party, is empowered to ask any question or cause an investigation into any matter which the Commissioner may consider necessary, incidental or ancillary to a complete understanding of the Transaction. In particular, the Commissioner may inquire into:

- i) Was there adequate Town Council oversight over the Transaction?
- ii) Was Town Council's delegation of authority in relation to the Transaction appropriate?
- iii) Did Town Council receive sufficient independent professional advice prior to delegating its authority to conduct the RFP negotiate or finalize the Transaction?
- iv) Were the criteria developed to assess the proposals received during the RFP process appropriate and did the criteria serve the interests of the Ratepayers of Collingwood?

And, for the purpose of providing fair notice to the Town of Collingwood and those

individuals who may be required to attend and give evidence, and without infringing on the Commissioner's authority in conducting the Inquiry in accordance with the Resolution and the Commissioner's statutory authority, it is anticipated that the Inquiry may include:

1. An investigation and inquiry into all relevant circumstances pertaining to the Transaction referred to in the recitals to the Resolution, including the relevant facts pertaining to the Transaction, the basis of and reasons for making the recommendations for entering into the Transaction, and the basis of the decisions taken in respect of the Transaction;
2. An investigation and inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the Town of Collingwood, Collingwood Utility Services Corporation and PowerStream Inc.; and,
3. A two-stage process consisting of a document review and public hearings as follows:

*Document Review*

- (a) To obtain, bearing in mind cost and the principles of proportionality, all documents necessary to understand the following:
  - i. the sequence of events leading to the Transaction, including the Request for Proposal process commissioned by the Town of Collingwood;
  - ii. the nature and extent of the delegation of authority by Council to those who negotiated on behalf of the Town of Collingwood in relation to the RFP process and Transaction;
  - iii. any subsequent contracts entered between or among the Town of Collingwood and PowerStream, Collus PowerStream and any other Collus company;
  - iv. Any fee or benefit of any kind paid, or conferred, by or on behalf of PowerStream to any person in relation to the Transaction;
  - v. The commercial relationship between PowerStream, Collus PowerStream and any other Collus entity and the Town of Collingwood prior to 2017 and in particular, any agreement entered into between or among any of these parties;

- vi. The salaries, benefits and emoluments of any kind paid in relation to the Transaction to any employee of Collus PowerStream and any other Collus company;
- vii. The allocation of the proceeds of the transaction to the construction of the recreational facility at Central Park and Heritage Park.
- viii. The payment of any fee or benefit of any kind on behalf of any person of the entity involved in the creation or construction of the recreational facility at Central Park and Heritage Park;

*Public Hearings*

(b) To conduct public hearings into the matters designated in accordance with the principles of fairness, thoroughness, efficiency and accessibility.

- 4. The Commissioner may engage counsel and other persons to assist in the Inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the Town of Collingwood.

## Annex 1

### RES-042-2018

Moved by Deputy Mayor Saunderson  
Seconded by Councillor Madigan

**WHEREAS**, under s. 274 of the *Municipal Act*, 2001 S.O. 2001, c. 25, the Council of a Municipality may, by resolution, request a judge of the Superior Court of Justice to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business;

**AND WHEREAS** any judge so requested shall make inquiry and shall report the results of the investigation or inquiry to the Council as soon as practicable;

**AND WHEREAS** the Town of Collingwood concluded a Share Purchase Agreement on March 6, 2012 in which it sold 50% of Collingwood Utility Services Corporation to PowerStream Inc. ("the Transaction"; "PowerStream");

**AND WHEREAS** concerns have been raised about the wisdom and reasons for the Transaction;

**NOW THEREFORE** the Council of the Town of Collingwood does hereby resolve that:

1. An inquiry is hereby requested to be conducted pursuant to s. 274 of the *Municipal Act* which authorizes the Commissioner to inquire into, or concerning, any matter related to a supposed malfeasance, breach of trust, or other misconduct on the part of a member of Council, or an officer or employee of the Town or of any person having a contract with it, in regards to the duties or obligations of the member, officer, or other person to the corporation, or to any matter connected with the good government of the municipality, or the conduct of any part of its public business; and
2. The Honourable Chief Justice Smith, Chief Justice of the Superior Court of Ontario, be requested to designate a judge of the Superior Court of Ontario as Commissioner for the inquiry and the judge so designated as Commissioner hereby authorized to conduct the inquiry in two stages:
  - (a) To obtain, bearing in mind cost and the principles of proportionality, all documents necessary to understand the following:
    - (i) the sequence of events leading to the Transaction, including the Request for Proposal process commissioned by the Town of Collingwood;
    - (ii) the nature and extent of the delegation of authority by Council to those who negotiated on behalf of the Town of Collingwood in relation to the RFP process and Transaction;
    - (iii) any subsequent contracts entered between or among the Town of Collingwood and PowerStream, Collus PowerStream and any other Collus company;
    - (iv) Any fee or benefit of any kind paid, or conferred, by or on behalf of PowerStream to any person in relation to the transaction;
    - (v) The commercial relationship between PowerStream, Collus PowerStream and any other Collus entity and the Town of Collingwood prior to 2017 and in particular, any agreement entered into between or among any of these parties;
    - (vi) The salaries, benefits and emoluments of any kind paid to any employee of Collus PowerStream and any other Collus company;



- (vii) The allocation of the proceeds of the transaction to the construction of the recreational facility at Central Park and Heritage Park.
- (viii) The payment of any fee or benefit of any kind on behalf of any person of the entity involved in the creation or construction of the recreational facility.

(b) Having conducted the documentary review to determine what, if any, public hearings ought to be held into the matters designated for the inquiry herein;

**AND IT IS FURTHER RESOLVED THAT** the Terms of Reference of the Inquiry shall be: to inquire into all aspects of the above matters, their history and their impact on the ratepayers of the Town of Collingwood as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of the inquiry.

**AND IT IS FURTHER RESOLVED THAT** the Commissioner, in conduct the inquiry into the transactions in question to which the Town of Collingwood is a party, is empowered to ask any questions which he or she may consider as necessarily incidental or ancillary to a complete understanding of these transactions, and for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, without infringing on the Commissioner's discretion in conducting the inquiry in accordance with the Terms of Reference stated herein, it is anticipated that the inquiry may include the following:

- (c) Was there adequate Council oversight of the transactions listed above?
- (d) Was Council's delegation of authority in relation to the transaction appropriate?
- (e) Did council receive sufficient independent professional advice prior to delegating its authority to conduct the RFP negotiate or finalize the Transaction?
- (f) Where the criteria developed to assess the proposals received during the RFP process appropriate and did the criteria serve the interests of the ratepayers of Collingwood?

<u>COUNCIL</u>	<u>Yea</u>	<u>Nay</u>
<i>Cooper</i>		x
<i>Saunderson</i>	x	
<i>Fryer (absent)</i>		
<i>Edwards (absent)</i>		
<i>Ecclestone</i>	x	
<i>Jeffery</i>	x	
<i>Doherty</i>	x	
<i>Madigan</i>	x	
<i>Lloyd (absent)</i>		
<b>TOTAL</b>	<b>5</b>	<b>1</b>

APPENDIX B  
Section 274, Municipal Act, 2001

Judicial Investigation

Investigation by judge

**274** (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;

(b) inquire into any matter connected with the good government of the municipality; or

(c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors. 2001, c. 25, s. 274 (1).

Application of *Public Inquiries Act*, 2009

(2) Section 33 of the *Public Inquiries Act*, 2009 applies to the investigation or inquiry by the judge. 2009, c. 33, Sched. 6, s. 72 (5).

Report

(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable. 2001, c. 25, s. 274 (3).

Counsel

(4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry. 2001, c. 25, s. 274 (4).

Representation by counsel

(5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel. 2001, c. 25, s. 274 (5).

Costs

(6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality. 2001, c. 25, s. 274 (6).

**Section Amendments with date in force (d/m/y)**

[2009, c. 33, Sched. 6, s. 72 \(5\)](#) - 01/06/2011

APPENDIX C  
Section 33, Public Inquiries Act, 2009

Procedures under Other Acts

Former Part II inquiries

Definition

**33 (1)** In this section,

“inquiry” includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable. 2009, c. 33, Sched. 6, s. 33 (1).

Standard procedure

(2) This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section. 2009, c. 33, Sched. 6, s. 33 (2).

Power to summon witnesses, papers, etc.

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

Form and service of summons

(4) A summons issued under subsection (3) shall be in either the English or French version of the form prescribed by the regulations and shall be served personally on the person summoned and he or she shall be paid at the time of service the like fees and allowances for attendance as a witness before the person or body conducting the inquiry as are paid for the attendance of a witness summoned to attend before the Superior Court of Justice. 2009, c. 33, Sched. 6, s. 33 (4).

Stated case for contempt for failure to attend hearing, etc.

(5) Where any person without lawful excuse,

(a) on being duly summoned under subsection (3) as a witness at an inquiry makes default in attending at the inquiry; or

(b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the person or body conducting the inquiry to be taken or made, or to produce any document or thing in his or her power or control legally required by the person or body conducting the inquiry to be produced, or to answer any question to which the person or body conducting the inquiry may legally require an answer; or

(c) does any other thing that, if the person or body conducting the inquiry had been a court of law having power to commit for contempt, would have been contempt of that court,

the person or body conducting the inquiry may state a case to the Divisional Court setting out the facts and that court may, on the application of the person or body conducting the inquiry or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. 2009, c. 33, Sched. 6, s. 33 (5).

#### Protection of witnesses

(6) A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. 2009, c. 33, Sched. 6, s. 33 (6).

#### Right to object

(7) A witness shall be informed by the person or body conducting the inquiry of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*. 2009, c. 33, Sched. 6, s. 33 (7).

#### No discipline of employees

(8) No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry. 2009, c. 33, Sched. 6, s. 33 (8).

#### Offence

(9) Any person who, contrary to subsection (8), takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. 2009, c. 33, Sched. 6, s. 33 (9).

## Application

(10) This section applies despite any other Act and the oath of office of a public servant within the meaning of the *Public Service of Ontario Act, 2006* is not breached where information is disclosed as described in subsection (8). 2009, c. 33, Sched. 6, s. 33 (10).

## Effective date

(11) This section applies to representations made, and information disclosed, on or after June 12, 2000. 2009, c. 33, Sched. 6, s. 33 (1).

## Unsworn evidence admissible

(12) A person or body conducting the inquiry may admit at an inquiry evidence not given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (12).

## Privilege

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

## Release of documents

(14) Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time. 2009, c. 33, Sched. 6, s. 33 (14).

## Photocopies of documents

(15) Where a document has been produced in evidence before a person or body conducting the inquiry, the person or body conducting the inquiry may or the person producing it may with the leave of the person or body conducting the inquiry, cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a copy of a document produced in evidence, certified to be a true copy thereof by the person or body conducting the inquiry, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced. 2009, c. 33, Sched. 6, s. 33 (15).

## Power to administer oaths and require evidence under oath

(16) A person or body conducting an inquiry has power to administer oaths and affirmations for the purpose of the inquiry and may require evidence to be given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (16).

## Powers of multiple appointees

(17) Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by subsection (3), (4), (14), (15) or (16). 2009, c. 33, Sched. 6, s. 33 (17).

# **APPENDIX “A”**



## APPENDIX A

### Commission of Inquiry Town of Collingwood Terms of Reference

WHEREAS on February 26, 2018, the Council of the Town of Collingwood passed Resolution 042-18 (the "Resolution") asking the Honourable Heather Smith, Chief Justice of the Superior Court of Justice, to designate a judge of the Superior Court of Justice to conduct an Inquiry in relation to the Town of Collingwood concluding a Share Purchase Agreement for the sale of Collingwood Utility Services Corporation to PowerStream Inc. on March 6, 2012 (the "Transaction"). The Resolution requesting the Inquiry was made pursuant to s. 274 of the Municipal Act, 2001 and is attached as **Annex 1**.

AND WHEREAS on April 6, 2018, Chief Justice Smith designated the Honourable Frank Marrocco, Associate Chief Justice of the Superior Court of Justice, to serve as Commissioner to this Inquiry.

NOW THEREFORE, the Council of the Town of Collingwood does hereby resolve that:

the Terms of Reference of the Inquiry shall be to inquire into all aspects of the Transaction, including the history, the price at which the shares were sold and the impact on the Ratepayers of the Town of Collingwood, as it relates to the good government of the Municipality, or the conduct of its public business, and to make any recommendations that the Commissioner may deem appropriate and in the public interest as a result of the Inquiry.

AND IT IS FURTHER RESOLVED that pursuant to s. 274 of the *Municipal Act, 2001*, and s. 33 of the *Public Inquiries Act*, the Commissioner, in conducting the Inquiry into the Transaction to which the Town of Collingwood is a party, is empowered to ask any question or cause an investigation into any matter which the Commissioner may consider necessary, incidental or ancillary to a complete understanding of the Transaction. In particular, the Commissioner may inquire into:

- i) Was there adequate Town Council oversight over the Transaction?
- ii) Was Town Council's delegation of authority in relation to the Transaction appropriate?
- iii) Did Town Council receive sufficient independent professional advice prior to delegating its authority to conduct the RFP negotiate or finalize the Transaction?
- iv) Were the criteria developed to assess the proposals received during the RFP process appropriate and did the criteria serve the interests of the Ratepayers of Collingwood?



And, for the purpose of providing fair notice to the Town of Collingwood and those individuals who may be required to attend and give evidence, and without infringing on the Commissioner's authority in conducting the Inquiry in accordance with the Resolution and the Commissioner's statutory authority, it is anticipated that the Inquiry may include:

1. An investigation and inquiry into all relevant circumstances pertaining to the Transaction referred to in the recitals to the Resolution, including the relevant facts pertaining to the Transaction, the basis of and reasons for making the recommendations for entering into the Transaction, and the basis of the decisions taken in respect of the Transaction;
2. An investigation and inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the Town of Collingwood, Collingwood Utility Services Corporation and PowerStream Inc.; and,
3. A two-stage process consisting of a document review and public hearings as follows:

*Document Review*

- (a) To obtain, bearing in mind cost and the principles of proportionality, all documents necessary to understand the following:
  - i. the sequence of events leading to the Transaction, including the Request for Proposal process commissioned by the Town of Collingwood;
  - ii. the nature and extent of the delegation of authority by Council to those who negotiated on behalf of the Town of Collingwood in relation to the RFP process and Transaction;
  - iii. any subsequent contracts entered between or among the Town of Collingwood and PowerStream, Collus PowerStream and any other Collus company;
  - iv. Any fee or benefit of any kind paid, or conferred, by or on behalf of PowerStream to any person in relation to the Transaction;
  - v. The commercial relationship between PowerStream, Collus PowerStream and any other Collus entity and the Town of Collingwood prior to 2017 and in particular, any agreement entered into between or among any of these parties;

- vi. The salaries, benefits and emoluments of any kind paid in relation to the Transaction to any employee of Collus PowerStream and any other Collus company;
- vii. The allocation of the proceeds of the transaction to the construction of the recreational facility at Central Park and Heritage Park.
- viii. The payment of any fee or benefit of any kind on behalf of any person of the entity involved in the creation or construction of the recreational facility at Central Park and Heritage Park;

*Public Hearings*

(b) To conduct public hearings into the matters designated in accordance with the principles of fairness, thoroughness, efficiency and accessibility.

- 4. The Commissioner may engage counsel and other persons to assist in the Inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the Town of Collingwood.